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ALEXANDER L. STEVAS,

NO. 83-1258

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN DEPARTMENT OF MENTAL HEALTH,

Petitioner,

vs.

DAVID L. RASIMAS,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GOODENOUGH, SMITH & MAY
BY: DAVID M. GUBOW
Attorney for Respondent
100 W. Long Lake Road
P.O. Box 541 -- Suite 200
Bloomfield Hills, Michigan 48013
(313) 646-9500

OF COUNSEL:
RALPH J. SIRLIN
JAY W. TOWER

RENAISSANCE PRINTING, INC., 76 W. ADAMS
8TH FLOOR, DETROIT, MICHIGAN 48226 — (313) 964-3185

QUESTIONS PRESENTED FOR REVIEW

The following questions are a clarification of Petitioner's Questions Presented for Review.

I. SHOULD THIS COURT GRANT CERTIORARI ON THE QUESTION OF WHETHER *MOHASCO CORP* V *SILVER*, 447 U.S. 807 (1980), SHOULD BE APPLIED RETROACTIVELY?

II. SHOULD THIS COURT GRANT CERTIORARI ON THE COURT OF APPEAL'S APPLICATION OF *DAVIS* V *CALGON CORP.*, 627 F.2d 674 (3rd Cir. 1980), *cert. denied*, 449 U.S. 101 (1981)?

III. SHOULD THIS COURT GRANT CERTIORARI ON WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING OF DISCRIMINATION?

IV. SHOULD THIS COURT GRANT CERTIORARI ON WHETHER UNEMPLOYMENT BENEFITS SHOULD BE DEDUCTED FROM A BACKPAY AWARD PRIOR TO THERE BEING ANY DETERMINATION OF BACKPAY?

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OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The United States District Court for the Eastern District of Michigan, Southern Division (hereinafter "District Court") after a bench trial before the Honorable James Harvey rendered a Memorandum Opinion and Order and Judgment

dismissing the within cause of action. *David L. Rasimas* v *Michigan Dept. of Mental Health*, No. 77-71697 (E.D. Mich., Sept. 16, 1980). In its Memorandum Opinion and Order the District Court held that Respondent's discharge was the product of illegal discrimination based upon his sex. However, the District Court nevertheless dismissed the case for the reason that under the law of *Mohasco Corp.* v *Silver*, 447 U.S. 807 (1980), Respondent did not make a timely filing with the Equal Employment Opportunity Commission (hereinafter "EEOC"). In addition, the District Court held that Respondent failed to mitigate his damages by refusing to accept an interview offered by the Petitioner. Respondent appealed from the Judgment of the District Court to the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") on the issues of timeliness and mitigation of damages. The Petitioner filed a cross appeal on the question of discrimination.

In *Rasimas* v *Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983) the Sixth Circuit affirmed the District Court's finding of sex discrimination and reversed the timeliness and mitigation of damages determinations. Further, the Sixth Circuit after "commend[ing] the District Court for its careful and sensitive treatment of the facts," remanded this action to the District Court for further proceedings consistent with its opinion to address the backpay issue which had not been fully addressed by the District Court due to its rulings on other issues.

The Petitioner then filed a Petition for Rehearing which was denied, *Rasimas* v *Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir., *reh'g denied* November 2, 1983).

JURISDICTIONAL GROUNDS

On July 28, 1983 the Sixth Circuit decided and filed its opinion affirming the District Court judgment in part, reversing it in part and remanding the case to the District Court for further proceedings consistent with its opinion.

Subsequent to the opinion of July 28, 1983 a Judgment consistent therewith was entered by order of the Sixth Circuit.

Petitioner sought a rehearing which was denied by the Sixth Circuit on November 2, 1983 for the reason that the petition for rehearing was without merit.

Petitioner has now petitioned this Court for a Writ of Certiorari pursuant to 28 U.S.C. §1254(1) requesting review of the Sixth Circuit's Opinion of July 28, 1983 and its order denying rehearing dated November 2, 1983.

STATEMENT OF THE CASE

Respondent does not adopt the statement of the case presented by Petitioner as it is laced with inaccuracies and omissions.

Respondent adopts as its statement of the case, with the exceptions as noted below, and incorporates by reference herein as if fully set forth, the District Court's "Findings of Fact" as set out in Judge Harvey's Memorandum Opinion and Order dated September 16, 1980 and contained in the Appendix to Petitioner's Petition For a Writ of Certiorari as pages 3a–42a and the Opinion of the Sixth Circuit contained in the aforementioned Appendix as pages 43a–66a.

Respondent takes exception to the second sentence of the District Court's Finding of Fact number 45 (p 24a) as knowledge of this fact was not obtained from the testimony of Respondent or from Exhibit #1, p 3, but only from the testimony of Petitioner's witness Mr. McDonald. Further, Respondent testified that he had no knowledge or information that any position whatsoever was ever available to him or that he had a right of first refusal. (See District Court Finding of Fact #47, p 25a).

SUMMARY OF ARGUMENT

Petitioner's questions do not present special and important reasons for the granting of a Writ of Certiorari by this Court. The Opinion of the Court of Appeals for the Sixth Circuit does not create a conflict among the Courts of Appeal, it does not present any ripe issues of national or general importance and it does not present issues that are likely to recur.

ARGUMENT

Generally speaking the issue presently before this Court is whether the decision of the Sixth Circuit should be reviewed by this Court. Sup. Ct. R. 17 states that review by this Court on Writ of Certiorari is not a matter of right, but a matter "of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17 also states that the character of reasons that will be considered in whether to grant a Writ of Certiorari are indicated by the following:

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals;

(b) When a Federal Court of Appeals has decided a federal question in a way in conflict with a State Court of last resort;

(c) When a Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision;

(d) When a State Court of last resort has decided a federal question in a way in conflict with the decision of another State Court of last resort or of a Federal Court of Appeals;

(e) When a State Court or Federal Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The present case does not involve any of the considerations enumerated in Sup. Ct. R. 17, nor does it involve considerations of the same character of those enumerated in Sup. Ct. R. 17.

I.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE QUESTION OF WHETHER *MOHASCO CORP.* V *SILVER*, 477 U.S. 807 (1980), SHOULD BE APPLIED RETROACTIVELY.

The Petitioner seeks review by this Court of the Sixth Circuit's decision not to apply *MOHASCO CORP.* v *SILVER*, 477 U.S. 807 (1980), retroactively.

In deciding that the present action was timely filed with the EEOC, the Sixth Circuit stated that the Ninth Circuit in *Wiltshire* v *Standard Oil of California*, 652 F.2d 837, (9th Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982) "exhaustively examined *Mohasco* and determined that it should not be applied to claims which were pending on the date the Supreme Court decision was announced," *Rasimas* v *Michigan Dept of Mental Health*, 714 F.2d 614, 622 (6th Cir. 1983). The Sixth Circuit went on to state that on two other occasions it had approved the *Wiltshire* holding.

> "First, *Hall* v *Ledex, Inc.*, 669 F.2d 397, 399 (6th Cir. 1982) analyzed *Mohasco* and endorsed the well-reasoned *Wiltshire* opinion: 'We agree with the Ninth Circuit that *Mohasco* should not be applied retroactively. . . . In *Jones,*

this Court noted the *Hall* opinion and its approval of *Wiltshire. Jones,* 691 F.2d at 1202 n.3." *Rasimas, Id.*

In the instant action the Sixth Circuit stated Respondent had filed his lawsuit in 1976, several years before *Mohasco* was announced and therefore, applying the precedents of *Hall, Jones* and *Wiltshire* held the present action to be timely filed with the EEOC.

In not applying *Mohasco* retroactively the Sixth Circuit did not create a conflict among the Circuits on a point of federal law, and the goal of a uniform application of federal law in the intermediate federal court system has therefore been achieved. Further evidence of uniformity has also been demonstrated in the Tenth Circuit in the case of *Cruz* v *Board of Education for the City of Trinidad School*, 537 F. Supp. 292 (D. Col., 1982), where the United States District Court for the District of Colorado also adopted the *Wiltshire* decision.

Next, the Sixth Circuit decision regarding retroactive application of *Mohasco* in the instant case presents no grounds for review that have not already been considered by this Court in its denial of a petition for writ of certiorari in the *Wiltshire* case where all the questions presented for review challenged the Ninth Circuit ruling that *Mohasco* was not to be applied retroactively, Docket No. 81-1152, filed December 18, 1981.

Further, as there are so few reported decisions regarding the retroactive application of *Mohasco,* all of which have been cited herein including the within cause, and because of the length of time since this Court's decision in *Mohasco* there is little likelihood this issue will recur.

Finally, the question presented for review is not one of general importance. While important to the litigants, the question lacks overall national importance, for the Sixth Circuit in following established precedent has decided a case that only affects the individual parties and not the general public.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE COURT OF APPEAL'S APPLICATION OF *DAVIS* V *CALGON CORP.*, 627 F.2d 674 (3rd Cir. 1980), *cert. denied,* 449 US 1101 (1981).

Petitioner seeks review by this Court of the Sixth Circuit's application of *Davis* v *Calgon Corp.*, 627 F.2d 674 (3rd Cir. 1980), *cert. denied,* 449 U.S. 1101 (1981). They are not challenging the substance of the deferral extension rule set forth in *Davis* nor are they alleging a conflict among the Courts of Appeal regarding the substance of the deferral extension rule. Rather, they are challenging the Sixth Circuit's application of *Davis*.

The position that in a deferral state a complaint need not be timely filed under state law before the claimant can benefit from the three hundred (300) day federal filing period was upheld by the United States Supreme Court when it summarily reversed and remanded two circuit court opinions holding otherwise. See *Ciccone* v *Textron Inc.*, 616 F.2d 116 (1st Cir. 1980), *vacated,* 449 U.S. 914 (1980), *on remand,* 651 F.2d 1 (1st Cir. 1981), *cert. denied,* 452 U.S. 917 (1981); and *Ewald* v *Great Atlantic and Pacific Tea Co,* 620 F.2d 1189 (6th Cir. 1980) *vacated,* 449 U.S. 914 (1980), *on remand,* 644 F.2d 884 (6th Cir. 1981), *cert. denied* 451 U.S. 985 (1981).

This is the position followed by the Third Circuit in *Davis* and the Sixth Circuit's application of *Davis* is not only in accord with the aforementioned Supreme Court holdings, but is not in conflict with any other Courts of Appeal at this time.

It might appear that the instant case is in conflict with older panels within the Sixth Circuit, but these decisions were overruled by the aforementioned Supreme Court decisions in *Ciccone,*

supra and *Ewald, supra.* Further, even if a conflict still remained between the instant case and the decisions of older panels within the Sixth Circuit, it is the task of the Sixth Circuit to reconcile its internal differences. It is not an occasion to invoke the jurisdiction of this Court. *Wisniewski* v *United States*, 353 U.S. 901, 902 (1957).

III.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE ISSUE OF WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING OF DISCRIMINATION.

Petitioner requests a Writ of Certiorari on the ground that the District Court and the Sixth Circuit allegedly failed to find that Petitioner intentionally discriminated against Respondent.

Whether or not there is intentional discrimination is a finding of fact to be made by the trial court. It is not a mixed question of law and fact that would allow an appellate court to review the facts to see if they satisfy some legal concept. Thus an appellate court may only reverse a district court's finding of discrimination if it concludes that the finding is clearly erroneous. Fed. R. Civ. P. 52(a).

In a Title VII action the Plaintiff must establish a prima facie case, which then creates a rebuttable presumption that the employer unlawfully discriminated against him. *U.S. Postal Service Board of Governors* v *Aikens*, ____ U.S. ____, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403, 410 (1983), citing *Texas Department of Community Affairs* v *Burdine*, 450 U.S. 248, 254 (1981). Also see *McDonnell Douglas Corp.* v *Green*, 411 U.S. 792 (1973). To rebut this presumption, "the Defendant must produce evidence that the Plaintiff was rejected. . . for a legitimate, nondiscriminatory reason." *Id.*

> "But when the Defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the Plaintiff's proof by offering evidence of the reason for the Plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII." *Id.*, at 1482.

In the instant case the District Court very carefully and in great detail set forth its findings of facts and concluded that Respondent established a prima facie case of sexual discrimination. The District Court then went on to state that the Petitioner presented some legitimate reasons for Respondent's dismissal. However, after a full discussion the Court concluded that Respondent successfully rebutted these reasons, that these reasons constituted a pretext for Respondent's dismissal, and that his discharge was the product of illegal discrimination based upon his sex.

On appeal the Petitioner argued that the District Court's finding of sex discrimination was clearly erroneous and that Respondent did not present a prima facie case. The Sixth Circuit disagreed with this argument and affirmed the District Court's finding of sex discrimination.

Thus, it is clear from the decisions below that on the basis of all the facts and a determination of credibility, the Petitioner did intentionally discriminate against the Respondent on the basis of sex. Further, the decisions below were made with specific reference to the standards articulated by this Court in *McDonnell Douglas, supra,* and *Burdine, supra,* indicating that the Courts below correctly applied the appropriate standards for determining the existence of intentional discrimination.

Accordingly, as the action below did not conflict with the applicable decisions of this Court, the Petition should be denied on this issue.

Finally, Petitioner is seeking review by this Court on the basis that this Court would interpret the facts differently than

the Courts below. This Court however, is not the place to review a conflict of evidence nor the place to analyze an issue of fact. This type of review of an issue of fact where one judge might rule one way rather than the other is not "important" for purposes of Sup. Ct. R. 17.

IV.

THIS COURT SHOULD NOT GRANT CERTIORARI ON WHETHER UNEMPLOYMENT BENEFITS SHOULD BE DEDUCTED FROM A BACKPAY AWARD PRIOR TO THERE BEING ANY DETERMINATION OF BACKPAY.

Petitioner claims that this Court should grant certiorari on the issue of whether unemployment benefits should be deducted from backpay awards and claims this to be an important question of federal law that should be settled by this Court.

In its Opinion the Sixth Circuit points out that the backpay issue was never fully addressed by the District Court due to its rulings on other issues. Therefore, in remanding the within cause to the District Court for further proceedings consistent with its opinion the Sixth Circuit set forth certain guidelines for the District Court to follow in awarding backpay. However, there has been neither a determination nor actual award of backpay in the instant case. Moreover, there have been no findings of fact that Respondent ever received any unemployment compensation or if he received these benefits, whether or not he has to reimburse the State agencies which provided these monies. Also there has been no determination whatsoever that there would be a double recovery by the Respondent. Therefore, this challenge by the Petitioner is not ripe for review for as stated in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143

(1974), "the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied."

To ask this Court to grant certiorari on this question now would be asking for an advisory opinion in advance of any adverse effect in the context of a concrete case and as pointed out in *International Longshoremen's and Warehousemen's Union, Local 37* v *Boyd*, 347 U.S. 222, 224 (1954), this "involves too remote and abstract an inquiry for the proper exercise of judicial function."

Finally, as Justice Fortas pointed out the reason for deferring consideration of abstract or premature claims is to allow governmental processes

> an opportunity to function — to iron out differences, to accomodate special problems. . . . The courts do not and should not pass on these complex problems in the abstract and the general — because these regulations peculiarly depend for their quality and substance upon the fact of particular situations. We should confine ourselves — as our jurisprudence dictates — to actual, specific, particularized cases and controversies, in substance as well as in technical analysis. *Abbott Laboratories* v *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681; *Toilet Goods Association* v *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697; *Gardner* v *Toilet Goods Association*, 387 U.S. 167, 200, 87 S.Ct. 1526, 1543, 18 L.Ed.2d 704 (1967) (Fortas, J., concurring and dissenting)

Young v *Klutznick*, 652 F.2d 617 (6th Cir. 1981)

Further, Petitioner has failed to demonstrate any immediate injury which would occur were this Court not to act.

Hence, because the District Court has not had the opportunity to make findings of fact on this particular issue and apply

them according to the Sixth Circuit's guidelines and since Petitioner has failed to demonstrate any immediate injury which would occur were this Court not to act this issue is clearly not ripe for review.

CONCLUSION

For the foregoing reasons Petitioner has not presented special and important reasons why his Petition for a Writ of Certiorari should be granted. Wherefore, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

GOODENOUGH, SMITH & MAY

BY: /s/ DAVID M. GUBOW
Attorney for Respondent
100 W. Long Lake Road
P.O. Box 541 — Suite 200
Bloomfield Hills, Michigan 48013
(313) 646-9500

OF COUNSEL:

RALPH J. SIRLIN
JAY W. TOWER

DATED: March 30, 1984